PRIVY COUNCIL REPORT

THE "HALCYON ISLE" BANKERS TRUST INTERNATIONAL LIMITED v. TODD SHIPYARDS CORPORATION

[P.C. (Lord Diplock, Lord Salmon, Lord Elwyn-Jones, Lord Scarman & Lord Lane) February 11-14 & June 24, 1980]

[Privy Council Appeal No. 19 of 1978]

Shipping — Several claims against proceeds of sale of mortgaged ship — Maritime lien — Whether ship-repairers who are holders of maritime lien under U.S. law could claim priority over mortgagees — High Court (Admiralty Jurisdiction) Act (Cap. 6), s. 4(3).

Conflict of laws — Claims against proceeds of sale of mortgaged ship — Whether ship repairers who are holders of maritime lien under U.S. law could claim priority over mortgagees — Lex fori.

This was an appeal from the decision of the Court of Appeal of Singapore reported in [1978] 1 M.L.J. 189.

The ship "Halcyon Isle" was arrested by the appellants, mortgagees of the vessel on September 5, 1974 in Singapore. The ship was subsequently sold on March 5, 1975 and the proceeds were paid into court. There were in all 13 claims, in regard to the priority of payments to the several claimants against the said funds. The respondents claimed priority of payment before "BTI" Mortgagee's claim No. 12. The respondents' claim was for $237,011 with interest for repairs executed, materials supplied and services rendered to the vessel "Halcyon Isle" at their repair yard at Brooklyn. New York during March, 1974 pursuant to a contract with the owners. The respondents contended that their claim for repairs done to the said vessel under the laws of the United States of America carried a maritime lien on the vessel and hence over the said fund and they were entitled to priority of payment on their claim over the appellants' claim which was merely that of a mortgagee of the vessel.

The appellants — the mortgagees — moved the High Court to determine the priority of payments to the several claimants against the proceeds of sale of the ship. The respondents — the ship-repairers — had earlier applied for a declaration that they were entitled to a maritime lien in respect of their claim. The High Court heard the appellants' motion and the adjourned motion of the respondents for a declaration at the same time and dismissed the respondents' claim for the declaration they sought and held that the appellants as mortgagees were entitled to rank before the respondents as ship-repairers to payment of the proceeds of sale ([1977] 1 M.L.J. 145). The respondents appealed and on appeal to the Court of Appeal the sole question was whether or not in a Singapore court the claim of the respondents as ship-repairers for repairs executed in New York has priority as against the proceeds of sale of the ship over the claim of the appellant as mortgagees of the ship.

The Court of Appeal allowing both appeals held that having ascertained that under American law a person who furnished in America repairs to a ship acquired a valid maritime lien on the ship, a Singapore court, applying Singapore remedies, would rank a claimant who had a valid maritime lien, which was in its nature a substantive right in the ship, above a claimant who had a mortgage over the ship.

The appellants appealed.

Held, by a majority allowing the appeal: (1) in principle the question as to the right to proceed *in rem* against a ship as well as priorities in the distribution between competing claimants of the proceeds of its sale in an action *in rem* in the High Court of Singapore, fell to be determined by the *lex fori* as if the events that gave rise to the claim had occurred in Singapore;

(2) the English authorities support the principle that, in the application of the English rules of conflict of laws, maritime claims are classified as giving rise to maritime liens which are enforceable in actions *in rem* in English courts where and only where the events on which the claim is filed would have given rise to a maritime lien in English law, if these events had occurred within the territorial jurisdiction of the English Court;

(3) in principle, in accordance with long established English authorities and consistently with international comity as evidenced by the wide acceptance of the International Convention of 1952 on the Arrest of Sea-going ships, the question whether or not in the instant case the respondent (the Necessaries Men) are entitled to priority over the appellants (the Mortgagees) in the proceeds of sale of the "Halcyon Isle" depends on whether or not if the repairs to the ship had been done in Singapore the repairer would have been entitled under the law of Singapore to a maritime lien on the "Halcyon Isle" for the price of them. As the answer to that question is that they are not, the appellants as mortgagees were entitled to priority.

Cases referred to:-

(1) *"The Bold Buccleugh"* (1851) 7 Moo P.C. 267; 13 E.R. 884.
(2) *"The Colorado"* [1923] P. 102.
(3) *"The Ripon City"* [1897] P. 226, 242.
(4) *"The Golubchick"* (1840) 1 W. Rob. 143.
(5) *"The Pieve Superiore"* (1874) L.R. 5 P.C. 482.
(6) *"The Milford"* (1858) Swa. 362.
(7) *"The Tagus"* [1903] P. 44.
(8) *"The Zigurds"* [1932] P. 113.
(9) *"The Acrux"* [1965] P. 391.
(10) *"The Two Ellens"* (1872) L.R. 4 P.C. 161.
(11) *"The Pacific"* (1864) Br. & L. 243; 167 E.R. 356.
(12) *"The Salacia"* (1862) Lush. 545; 167 E.R. 246.
(13) *"The Sara"* (1889) 14 App. Cas. 209.
(14) *"The Ioannis Daskalelis"* [1974] 1 Lloyd's Rep. 174.
(15) *"The Strandhill"* [1926] 4 D.L.R. 801.
(16) *"The Astoria"* [1931] Ex. C.R. 195.
(17) *"The Tervaete"* [1922] P. 259.
(18) *"The Tolten"* [1946] P. 135.
(19) *Don* v. *Lippmann* (1837) 5 Cl. & Fin. 1, 13; 7 E.R. 303.
(20) *Coal Export Corporation* v. *Notias* [1962] E.A. 220.
(21) *"The Christine Isle"* [1974] A.M.C. 331.

PRIVY COUNCIL APPEAL FROM SINGAPORE.

Michael Thomas Q.C. (*Simon Gaunt* with him) for the appellants.

R.F. Stone Q.C. (*Jervis Kay* with him) for the respondents.

Cur. Adv. Vult.

Lord Diplock (delivering the majority judgment of the Board): The appellants ("the Mortgagees") are an English bank. They held a mortgage on a British ship the "Halcyon Isle" registered in London. It was dated April 27, 1973, and registered on May 8, 1974. The respondents ("the Necessaries Men") are ship-repairers carrying on business in New York. They executed repairs to the "Halcyon Isle" at their Brooklyn yard in New York State in March 1974. Under United States law a ship-repairer is entitled to a maritime lien for the price of repairs done to a ship. The "Halcyon Isle" was arrested in Singapore on September 5, 1974 in an action *in rem* brought in the High Court of Singapore by the Mortgagees. On March 6, 1975, she was sold by order of the court, for a sum insufficient to satisfy in full the claims of all the creditors of her owners. The question of law directly involved in this appeal is whether in the distribution of the proceeds of sale the claim of the Mortgagees should take priority over the claim of the Necessaries Men or *vice versa*.

Although the admiralty jurisdiction of the High Court of Singapore is statutory the order of priorities in the distribution of the proceeds of sale of a ship

in an action *in rem* or in a limitation action is not. It is a matter of practice and procedure of that court in the exercise of its admiralty jurisdiction; and in matters of practice and procedure as well as the substantive law which it administers there is no relevant difference between the law of Singapore and the law of England. Since nearly all the cases to be cited will be English cases, their Lordships will for brevity use the expression "English law" as embracing also the law of Singapore administered by the High Court of Singapore in the exercise of its admiralty jurisdiction.

At first sight, the answer to the question posed by this appeal seems simple. The priorities as between claimants to a limited fund which is being distributed by a court of law are matters of procedure which under English rules of conflict of laws are governed by the *lex fori;* so English law is the only relevant law by which the priorities as between the Mortgagees and the Necessaries Men are to be determined; and in English law mortgagees take priority over Necessaries Men.

In the case of a ship, however, the classification of claims against its former owners for the purpose of determining priorities to participate in the proceeds of its sale may raise a further problem of conflict of laws, since claims may have arisen as a result of events that occurred not only on the high seas but also within the territorial jurisdictions of a number of different foreign states. So the *lex causae* of one claim may differ from the *lex causae* of another, even though the events which gave rise to the claim in each of those foreign states are similar in all respects, except their geographical location; the *leges causarum* of various claims, of which under English conflict rules the "proper law" is that of different states, may assign different legal consequences to similar events. So the court distributing the limited fund may be faced, as in the instant case, with the problem of classifying the foreign claims arising under differing foreign systems of law in order to assign each of them to the appropriate class in the order of priorities under the *lex fori* of the distributing court.

The choice would appear to lie between (1) on the one hand classifying by reference to the events on which each claim was founded and giving to it the priority to which it would be entitled under the *lex fori* if those events had occurred within the territorial jurisdiction of the distributing court; or (2) on the other hand applying a complicated kind of partial *renvoi* by (i) first ascertaining in respect of each foreign claim the legal consequences, *other than those relating to priorities in the distribution of a limited fund,* that would be attributed under its own *lex causae* to the events on which the claim is founded; and (ii) then giving to the foreign claim the priority accorded under the *lex fori* to claims arising from events, however dissimilar, which would have given rise to the same or analogous legal consequences if they had occurred within the territorial jurisdiction of the distributing court. To omit the dissection of the *lex causae* of the claim that the second choice prescribes and to say instead that if under the *lex causae* the relevant events would give rise to a maritime lien, the English court must give to those courts all the legal consequences of a maritime lien under English law would, in their Lordships' view, be too simplistic an approach to the questions of conflicts of law that are involved.

Even apart from the merit of simplicity, the choice in favour of the first alternative, classification by reference to events, appears to their Lordships to be preferable in principle. In distributing a limited fund that is insufficient to pay in full all creditors of a debtor whose claims against him have already been quantified and proved, the court is not any longer concerned with enforcing against the debtor himself the individual creditors' original rights against him. It is primarily concerned in doing evenhanded justice between competing creditors whose respective claims to be a creditor may have arisen under a whole variety of different and, it may be, conflicting systems of national law. It may be plausibly suggested that the moral and rational justification of the general conflicts of law rule, applied by English courts to claims arising out of foreign contracts, that the contract should be given the same legal consequences as would be accorded to it under its "proper law", is that the legitimate expectations of the parties to the contract as to their rights against one another, which will result from entering into and carrying out the contract, ought not to be defeated by any change of the forum in which such rights have to be enforced. Rights of priority over other creditors of the defaulting party to such a contract, in a judicial distribution of a fund which is insufficient to satisfy all the creditors in full, are not, however, rights of the parties to the contract against one another. They are rights as between one party to the contract against strangers to the contract, the other creditors, who have done nothing to arouse any legitimate expectations in that party as to the priority to which he will be entitled in the distribution of such a fund. Every such creditor whose claim is based on contract or quasi-contract must have known that in so far as the legal consequences of his claim under its own *lex causae* included rights to priority over other classes of creditors in the distribution of a limited fund resulting from an action *in rem* against a ship, that particular part of the *lex causae* would be compelled to yield to the *lex fori* of any foreign court in which the action *in rem* might be brought.

Counsel for the Necessaries Men in the instant case, who are experienced litigants in courts of admiralty, has not suggested that they were not perfectly well aware of this when they allowed the "Halcyon Isle" to vacate the berth that she was occupying in their busy repair yard in Brooklyn and thereby relinquished their possessory lien for the unpaid work that they had done upon the ship. They would likewise know that if the "Halcyon Isle" were to enter a port in any of the major trading countries of the world while their bill *remained unpaid* they could have her arrested in an action *in rem* and in this way obtain the security of the ship itself for their claim; subject, however, to being postponed to any other claimants who might be entitled to priority under the *lex fori* of the country in which the action was brought. They, or their lawyers, would know, too, that the priorities as between various kinds of maritime claims accorded

by the *lex fori* were subject to considerable variation as between one country and another.

In the case of claimants to a limited fund consisting of the proceeds of sale of a ship in an action *in rem* brought in a court which, like the High Court of Singapore, applies English admiralty law and practice, the problem of classifying foreign maritime claims for the purposes of determining priorities is complicated by the legal concept of "maritime lien" to which some classes of maritime claims against a shipowner give rise in English law while other classes do not. This concept derived as it is from the Civil Law and not the common law may fairly be described as *sui generis*.

The classic description of a maritime lien in English law is to be found in *"The Bold Buccleugh"*[1] a case decided by the Privy Council at a time when the English Court of Admiralty regarded itself as applying not so much English law as the "general law of the sea of the whole of Europe". Sir John Jervis described the concept as having its origin in the Civil Law. He adopted as correct Lord Tenterden's definition of "maritime lien" in *Abbott* on Shipping, as meaning

"a claim or privilege upon a thing to be carried into effect by legal process"

and Sir John Jervis added:

"This claim or privilege travels with the thing into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached."

The expression "privilege" in this description of a maritime lien is a reference to the concept of *"privelège"* in the Civil Law from which the French *Code Civil* is derived. There, *privilège* is used in the sense of the right of a creditor of a particular class to be paid out of a particular fund or the proceeds of sale of a particular thing in priority to other classes of creditors of the owner or former owner of the fund or thing. In the French *Code Civil* it is distinguished from the concept of *"hypotheque"*, which was the subject of detailed analysis by the English Court of Appeal in *"The Colorado"*.[2]

Sir John Jervis, speaking in 1851, said that a maritime lien existed in every case in which the Court of Admiralty had jurisdiction to entertain an action *in rem* against a ship. Jurisdiction *in rem* and maritime lien went hand in hand. This had been true when the jurisdiction of the Court of Admiralty was at its lowest ebb in the early years of the nineteenth century as a result of harassment by the courts of common law. It has remained true in the law of the U.S.A. where today all maritime claims enforceable *in rem* are treated as giving rise to maritime liens; but it was no longer true in English law, even by 1851, after the jurisdiction of the Court of Admiralty had been extended by the Admiralty Court Act, 1840, and the Merchant Shipping Act, 1844. Subsequent extensions of jurisdiction *in rem* in respect of maritime claims were made by the Admiralty Court Act, 1861, and by later Merchant Shipping Acts until its modern jurisdiction was laid down in the Administration of Justice Act, 1956, which is in the same terms as the High Court (Admiralty) Jurisdiction Act, of Singapore.

During the period that the English Court of Admiralty regarded itself as applying the "general law of the sea" four classes of claims only were treated as giving rise to maritime liens on ships, viz.:

(1) Salvage;
(2) Collision damage;
(3) Seaman's wages; and
(4) Bottomry. Bottomry is now obsolete, but historically it provided a normal means of providing security for the price of goods and services supplied to a ship by Necessaries Men outside its home port.

Two additional classes of claims were added to this list by statute in the 19th Century. These were

(5) Master's wages, and
(6) Master's disbursements.

The ranking for the purpose of priority in the distribution of a limited fund that has been accorded by the English Court of Admiralty to claims within the various classes that were treated as giving rise to maritime liens was complicated. It still is. It can be found conveniently set out at paras. 1574 *et seq.* in the volume of *British Shipping Laws* that deals with Admiralty Practice. For present purposes it is sufficient to observe that the priorities, whether between class and class or within one class, bear no relation to the general rule applicable to other charges upon property as security for a debt: *qui prior est tempore potior est jure*. This rule is based upon the principle that when the owner of a thing grants a charge on it as security for the payment of a sum of money, he transfers to the grantee part of his own proprietary rights in the thing and so deprives himself of the ability to transfer to a subsequent grantee anything more than such proprietary rights as remain to him.

This principle, based as it is upon the concept of a transfer of proprietary rights, cannot explain the priorities accorded to maritime liens. Indeed a later maritime lien for one class of claim may rank in priority to an earlier maritime lien for another class of claim, and even within a single class a later maritime lien may rank in priority to an earlier one.

Thus when Gorell Barnes P. in *"The Ripon City"*[3] at p. 242 said of a maritime lien

"It is a right acquired by one over a thing belonging to another — *a jus in re aliena*. It is so to speak a subtraction from the absolute property of the owner in the thing.",

the second sentence is inaccurate if it is to be regarded as suggesting that the owner of a ship, once it has become the subject of a maritime lien, can no longer create a charge on the *whole* property in the ship which will rank in priority to the existing lien. This he can do—as for instance by entering into a salvage contract or by signing on a crew.

In English admiralty law and practice claims of all those six classes that have hitherto been treated as giving rise to a maritime lien take priority over claims under mortgages in the distribution of a limited

fund by the court, and mortgages themselves rank in priority to all classes of claims that have not been treated as giving rise to maritime liens.

[In view of the reference hereafter to be made to *"The Colorado"* it is also relevant to note that for the purpose of priority of ranking *inter se* mortgages fall into two classes:

(1) British registered mortgages (which can only be upon British ships) and

(2) other mortgages, British or foreign (which can be upon either British or foreign ships).

British registered mortgages rank in priority to all other mortgages and rank *inter se* in order of date of registration. All other mortgages regardless of whether they are British or foreign rank *inter se* in order of date of creation.]

The pattern of priorities, which has been applied by the English Admiralty Court in the distribution of the fund representing the proceeds of sale of a ship in an action *in rem,* thus affords no logical basis for concluding that, if a new class of claim additional to the six that have hitherto been recognised were treated under its own *lex causae* as having given rise to a maritime lien, this should have any effect on its ranking for the purpose of priority under the *lex fori* in the distribution of the fund by the court and, in particular, no logical basis for concluding that this should entitle it to priority over mortgages.

There is, however, an additional legal characteristic of a maritime lien in English law which distinguishes it from maritime claims to which no maritime lien attaches and which is not confined to rights to a particular rank of priority in the distribution by a court of justice of a limited fund among the various classes of creditors of a single debtor. A maritime lien continues to be enforceable by an action *in rem* against the ship in connection with which the claim that gave rise to the lien arose, notwithstanding any subsequent sale of the ship to a third party and notwithstanding that the purchaser had no notice of the lien and no personal liability on the claim from which the lien arose. This characteristic points in the direction of a maritime lien partaking of the nature of a proprietary right in the ship.

It is true that in the instant case this complication does not in fact arise; there had been no change of ownership since the claim of the Necessaries Men arose. Nevertheless it would be wrong to overlook this special characteristic of a maritime lien (for which the French expression is *droit de suite*) in any consideration of how a claim, which under its own *lex causae* would be treated as having the same legal consequences as those of a maritime lien in English law, is to be classified under English rules of conflict of laws for the purpose of distribution of a fund under Singapore law as the *lex fori;* for a maritime lien does something more than merely affect priorities.

As explained in the passage from *"The Bold Buccleugh"* that has already been cited, any charge that a maritime lien creates on a ship is initially inchoate only; unlike a mortgage it creates no immediate right of property; it is, and will continue to be, devoid of any legal consequences unless and until it is "carried into effect by legal process, by a proceeding *in rem*". Any proprietary right to which it may give rise is thus dependent upon the lienee being recognised as entitled to proceed *in rem* against the ship in the court in which he is seeking to enforce his maritime lien. Under the domestic law of a number of Civil Law countries even the inchoate charge to which some classes of maritime claims give rise is evanescent. Unless enforced by legal process within a limited time, for instance, within one year or before the commencement of the next voyage, it never comes to life. In English law, while there is no specific time limit to a maritime lien the right to enforce it may be lost by laches.

If and when a maritime lien is carried into effect by legal process, however, the charge dates back to the time that the claim on which it is founded arose. It is only this retrospective consequence of his having been able to enforce the legal process in a court of law that enables a claimant, whose entitlement to a maritime lien is still inchoate and has not yet come into effect, to pursue his claim to the lien, as it were proleptically, in a proceeding *in rem* against the ship at a time when it no longer belongs to the shipowner who was personally liable to satisfy the claim in respect of which the lien arose.

This characteristic of a maritime lien is one that is unique in English law. It has the result that the recognition of any new class of claim arising under foreign law, as giving rise to a maritime lien in English law because it does so under its own *lex causae,* may affect not only priorities as between classes of creditors of a particular debtor in the distribution of the proceeds of sale of a particular ship in an action *in rem,* but such recognition may also extend the classes of persons who are entitled to bring such an action against a particular ship, i.e. by including among them some who, although they have no claim against the current owner of the ship, have claims against his predecessor in ownership.

But any question as to who is entitled to bring a particular kind of proceeding in an English court, like questions of priorities in distribution of a fund, is a question of jurisdiction. It too under English rules of conflict of laws falls to be decided by English law as the *lex fori.*

Their Lordships therefore conclude that, in principle, the question as to the right to proceed *in rem* against a ship as well as priorities in the distribution between competing claimants of the proceeds of its sale in an action *in rem* in the High Court of Singapore falls to be determined by the *lex fori,* as if the events that gave rise to the claim had occurred in Singapore.

Although in the English cases involving claims to maritime liens, which extend over a period of a century and a half, there is no apparent recognition in the judgments that any hidden problems of conflict of laws might be involved, the English Courts of Admiralty have consistently applied English rules as to what classes of events give rise to maritime liens wherever those events may have occurred. Not one single

case has been drawn to their Lordships' attention in which it has been treated as relevant that a transaction or event did or did not give rise to a maritime lien under the law of the country where the transaction or event took place; even though the judges of the Court of Admiralty were fully aware that under the law of many European countries claims falling outside the six classes recognised by English law were treated by those countries' courts as giving rise to maritime liens. Claims for the supply of necessaries provided the most widespread example of foreign recognition of a maritime lien; but, under French law in particular, a wide variety of other maritime claims were treated as giving rise to *privilèges,* i.e. maritime liens.

To take an early example in *"The Golubchick"*,[4] the English rule was applied by Dr. Lushington to claims for wages by Spanish seamen engaged on a Russian vessel. In *"The Pieve Superiore"*,[5] the Privy Council in the course of its judgment stated as self-evident that cargo claims against an Italian vessel did not give rise to a maritime lien. *"The Milford"*,[6] *"The Tagus"*,[7] *"The Zigurds"*[8] and *"The Acrux"*[9] are supporting authorities, spanning a century, in which the court has applied English rules as to the existence and extent of maritime liens and not the differing rules which would have been applicable under the *lex causae.*

The statutory extensions by the Admiralty Court Acts 1840 and 1861 of the jurisdiction of the English Court of Admiralty to entertain actions *in rem* against ships in respect of claims of most of the kinds now listed in the current Singapore and English statutes, including claims by Necessaries Men, might have been regarded as entitling these new claims to maritime liens. Under admiralty practice as it then existed this would have given to them that priority over mortgagees to which the Necessaries Men in the instant case would be entitled under United States law. After some early vacillation by Dr. Lushington, however, it was decided by the Privy Council in *"The Two Ellens"*,[10] that those English statutes did not create a maritime lien for any of the additional classes of claims over which the Court of Admiralty had newly been granted jurisdiction, and that, accordingly, mortgagees had priorities over Necessaries Men. See also *"The Pacific"*.[11] It required an express provision of an English statute to create a maritime lien for classes of claims other than those entitled to such liens under what the Court of Admiralty regarded and referred to as the "general law of the seas". This was done in the case of masters' wages by the Merchant Shipping Act, 1854, *"The Salacia"*[12] and in the case of masters' disbursements by the Merchant Shipping Act, 1889 after the House of Lords in *"The Sara"*[13] had held that the earlier statutes conferred no such lien.

In coming to the conclusion in the instant case that, because it would have given rise to a maritime lien under its *lex causae* (United States law) to which effect would be given by an American Court applying U.S. law as the *lex fori,* the Necessaries Men's claim was therefore entitled to the same priority over mortgages as maritime liens as a class enjoy over mortgages under the law of Singapore as the *lex fori,* the Court of Appeal were greatly influenced by the decision of the Supreme Court of Canada in *"The Ioannis Daskalelis"*[14] that under Canadian law, which in admiralty matters is derived from English law, American Necessaries Men took priority over mortgagees of a Greek ship. There had been a previous decision of the Supreme Court of Canada in 1926 *"The Strandhill"*,[15] in which it had been held that American necessaries men could proceed to enforce their claim by an action *in rem* against the ship notwithstanding a subsequent change in ownership; but this earlier decision expressly left open the question whether priorities between competing claims would be determined by Canadian law. A subsequent decision of the Canadian Court of Exchequer had determined that priorities were to be determined by Canadian law, *"The Astoria"*.[16] In overruling *"The Astoria"* the Supreme Court of Canada in *"The Ioannis Daskalelis"* relied strongly on the judgment of the English Court of Appeal in *"The Colorado"*, a case that was not concerned with a claim to a maritime lien at all.

The only question in *"The Colorado"* was whether a *hypothèque* executed and registered in France over a French ship created a proprietary right in the ship which the court would recognise as similar enough in legal character to an English mortgage to justify according it the priority over the claim of necessaries men to which a mortgagee would be entitled in *English* law. This is not a problem that would have troubled the Court of Admiralty when it was manned by civil lawyers; they would have known all about the legal concept of *hypothèque.* An examination of the expert evidence of French law, which can be found in the report of the case in 16 *Aspinall's* Maritime Law Cases, at pp. 145 to 147, discloses that, contrary to what Scrutton L.J. said at [1923] P. p. 109, a *hypothèque* does constitute a *jus in rem* or right of property in the ship that is created consensually to secure a debt; although, unlike an English mortgage, it gives no right to take possession of the *res.* There is nothing inchoate about it; it requires registration and is enforceable by judicial sale. It has different characteristics from a *privilège* in French law and, what is significant for present purposes, according to the *French* law of priorities, it ranks behind and not before the claims of necessaries men.

In *"The Colorado"* the court looked at the French law as the "proper law" of the *hypothèque* simply to see what its legal nature was. In describing the right created by *hypothèques* in French law as being equivalent to a maritime lien in English law (a passage much relied upon by the Canadian court) Scrutton L.J. can only have been speaking loosely. They have some characteristics in common; but Scrutton L.J. could hardly be taken to have been suggesting that a *hypothèque* would take priority over a prior English mortgage — as it would if it were to be treated by an English court as being a maritime lien. On the contrary the *French* law as to the priority of maritime liens over *hypothèques* was said by all three Lords Justices to be irrelevant; nor did any of the members of the court regard their decision as inconsistent with *"The Milford"* or *"The Tagus"*. Both these cases were cited by Scrutton and Atkin L.JJ. in support of their respective judgments.

Moreover the same three Lords Justices had in the previous year decided *"The Tervaete"* [17] Atkin L.J. there says in terms

"[The maritime lien] is confined to a right to take proceedings in a court of law

and

"The right of maritime lien appears... to be essentially different from a right of property, hypothec or pledge created by [a] voluntary act."

Scrutton L.J. refers to a maritime lien as

"a privilege or lien... in this sense, that *if the vessel comes within English territorial waters* it may be arrested and the claim or privilege on it will date back to the time of the lien." (The italics have been added).

Bankes L.J. considered that a maritime lien might properly be regarded in one or other of three ways:

"as a step in the process of enforcing a claim against the owners of a ship, or as a remedy or partial remedy in itself, or as a means of securing priority of claim."

The reasoning of all three judgments is consistent only with the characterisation of a maritime lien in English law as involving rights that are procedural or remedial only, and accordingly the question whether a particular class of claim gives rise to a maritime lien or not as being one to be determined by English law as the *lex fori*. Their Lordships, with great respect, consider that in *"The Ioannis Daskalelis"* the judgments in *"The Colorado"* were misunderstood by the Supreme Court.

In the instant case the Court of Appeal in Singapore also relied upon statements on the legal nature of a maritime lien in English law which are to be found in the judgment of Scott L.J. in *"The Tolten"*.[18] That was an action brought to enforce a maritime lien for damage caused by a ship in collision with a port installation in Nigeria. Collision damage gives rise to a maritime lien in English law and in the maritime law of the great majority of other Western countries, i.e. under what Scott L.J. repeatedly referred to in his judgment as "the general law of the sea amongst Western nations" out of which, he said, our own maritime law largely grew. Scott L.J. in *"The Tolten"* was not concerned with the "proper law" by which the existence or non-existence of a maritime lien was to be determined, but with a question, that was purely one of English law as the *lex fori* — a choice between two competing rules of English law as to the jurisdiction of English courts viz. the existence of jurisdiction to enforce against a ship which had come within English territorial waters what was unquestionably recognised by English law as a maritime lien and the absence of any jurisdiction to entertain actions concerning foreign land. Scott L.J. had participated in the conferences which resulted in the International Convention on Maritime Liens and Mortgages of 1926 which the United Kingdom never ratified because it required member states to create and recognise maritime liens in favour of Necessaries Men. No-one was better aware than Scott L.J. of the wide departure from what he called the general law of the sea that had occurred in many western countries as regards the creation of maritime liens under their domestic law for a whole variety of claims against shipowners. France and the United States were conspicuous examples of this. Their domestic laws provided for the enforcement of maritime liens in respect of nearly every kind of maritime claim listed in section 3 of the High Court (Admiralty Jurisdiction) Act, of Singapore. Throughout his judgment in *"The Tolten"* their Lordships think it clear that Scott L.J. was treating English law as the only proper law to determine what kind of transaction or event gave rise to a maritime lien that an English court had jurisdiction to enforce as such.

In their Lordships' view the English authorities upon close examination support the principle that, in the application of English rules of conflict of laws, maritime claims are classified as giving rise to maritime liens which are enforceable in actions *in rem* in English courts where *and only where* the events on which the claim is founded would have given rise to a maritime lien in English law, if those events had occurred within the territorial jurisdiction of the English court.

From principle and authority their Lordships turn finally to the language of what is now the statutory source of admiralty jurisdiction of the High Court of Singapore, the High Court (Admiralty Jurisdiction) Act. It is in the same terms as the corresponding provisions of the English Administration of Justice Act, 1956, which confer upon the High Court of England its current admiralty jurisdiction *in rem* and *in personam*. The English statute was passed to enable this country to ratify the International Convention of 1952 on the Arrest (*"saisi conservatoire"*) of Sea-going Ships ("The 1952 Convention"). The Singapore Act was probably passed for the same purpose although, in the event, it appears that Singapore has not yet ratified the Convention. Nevertheless the identical words of the Singapore statute ought also to be construed in the light of the Convention to which the English statute was intended to give effect.

The list of claims over which the High Court has admiralty jurisdiction under the statute ("maritime claims") reproduces, with one addition relating to forfeiture and condemnation, the list of maritime claims to be found in the Convention. The list is both exhaustive of the claims in respect of which the courts of one Contracting Party to the Convention may arrest a ship flying the flag of any other Contracting Party, and is compulsory upon the court if invoked by an applicant claiming to be entitled to any of the maritime claims in the list.

The Convention deals with what in Civil Law countries are treated as two separate kinds of "jurisdiction" viz.:

(1) jurisdiction to arrest a ship upon the application of a person claiming to be a creditor of the present or former owner of the ship in respect of a maritime claim and to release the ship upon the provision of bail or security sufficient to satisfy a judgment for the claim rendered by a court of competent jurisdiction (i.e. *"saisi conservatoire"*) and

(2) jurisdiction to determine the claim on the merits (i.e. *sur le fond*) and to order a judicial sale of the ship to satisfy the claim and any other maritime claims affecting the ship.

The concept of "*saisi conservatoire*" is unknown to English law. In Civil Law countries it is not peculiar to maritime law; it applies to other kinds of moveable property. It is a procedure whereby a court, which has no jurisdiction over a claim *ratione causae* but within whose geographical area of jurisdiction property of the defendant to the claim is to be found, may arrest that property on the application of the claimant and retain it, or any security provided to obtain its release, in judicial custody to abide the result of the judgment of another court which does have jurisdiction over the claim *ratione causae*. Although generally exercised by one court having local jurisdiction in aid of another court with local jurisdiction in the same country, it also extends to "*saisi conservatoire*" in aid of foreign courts.

In English and Singapore law where "*saisi conservatoire*" is unknown, jurisdiction *in rem* to arrest a ship on the application of a claimant and jurisdiction to adjudicate on the merits of his maritime claim are co-extensive. The Convention recognises the supremacy of the *lex fori* in matters of jurisdiction to adjudicate on the merits by providing in Article 7

"The Courts of the country in which the arrest was made shall have jurisdiction to determine the case upon its merits" (*i.e. sur le fond*) "*if the domestic law of the country in which the arrest is made gives jurisdiction to such Courts.*"

(The italics have been added.)

Leaving aside questions as to the ownership or possession of ships, the maritime claims appearing in the list contained in the Convention and the English and Singapore statutes fall into three classes:

1. claims in respect of mortgages or charges on a ship:
2. maritime claims which in English law give rise to a "maritime lien" on a ship for the amount claimed: and
3. maritime claims which give rise to a right of arrest of a ship but in English law do *not* give rise to a maritime lien.

As has been pointed out, apart from questions of priorities, with which the Convention does not deal at all, an essential difference between claims in classes 2 and 3, is that claims which give rise to a maritime lien on a ship may be enforced *in rem* against that ship notwithstanding that it has subsequently been sold to a *bona fide* purchaser for value without notice of the claim. This is expressly provided for in Article 8 of the International Convention of 1926 on Maritime Liens and Mortgages which says

"Claims secured by a lien follow the vessel into whatever hands it may pass."

It is this that makes the recognition of types of claims as giving rise to maritime liens of considerable commercial importance to the market for the purchase and sale of ships and in the provision of finance for their construction and acquisition. Article 9 of the Convention of 1952 is important. Among the maritime nations of the world at the time of the 1952 Convention, there was still no uniformity of recognition of what categories of maritime claims gave rise to maritime liens. The United Kingdom policy, reflected in its refusal to ratify the 1926 Convention on Maritime Liens and Mortgages, had been to keep down to a minimum the number of maritime liens that should be recognised, so as to prevent what can be described as "secret charges" arising and gaining priority over mortgagees and over subsequent purchasers for value of the ship. The United Kingdom stood at one extreme; under its domestic law only six categories of claims, one of which is obsolete, give rise to maritime liens. The United States stood at the other; under its domestic law maritime liens are granted for practically all classes of maritime claims, including even claims for damage to cargo and for damages for breach of charterparty.

Article 2 of the 1952 Convention which confers the right of arrest for claims other than those arising under mortgages, hypothecations and other similar charges says nothing about change of ownership of the particular ship between the time the claim arose and the time of the arrest. This is dealt with by Article 9 which provides, in the English language version:

"9. *Nothing in this Convention shall be construed* as creating a right of action which, apart from the provisions of this Convention, would not arise under the law applied by the court which had seisin of the case *nor as creating any maritime liens which do not exist under such law* or under the Convention on Maritime Liens and Mortgages, if the latter is applicable." (Italics supplied).

In the French language version, "any maritime liens" appears as "*aucun droit de suite*" — which may be thought to be a clearer expression in the context of Articles 2 and 9.

Article 9 of the Convention in their Lordships' view points strongly to wide international recognition of the characterisation of "maritime liens" where this expression is used in the 1926 and 1952 Conventions, as procedural or remedial only and governed by the *lex fori* of the country whose courts have seisin of the case.

The English and Singapore statutes of which the subject-matter, be it noted, is the "jurisdiction" of the court, comply with the requirements of Articles 2 and 9 of the 1952 Convention by the provisions appearing in sections 4(2), (3) and (4) of the Singapore Statute. In general subsections (2) and (4) confine the jurisdiction of the court to entertain actions *in rem*, and consequently the right of arrest, to ships belonging to the person who was owner of the ship in respect of which the claim arises at the date when that claim arose; but subsection (3) extends the jurisdiction of the court to entertain actions *in rem* against the particular ship in respect of which there is a "maritime lien or other charge" on it for the amount claimed, regardless of who is currently that ship's owner. "Maritime lien" as used in section 4(3) should thus be understood in the same sense as the same expression in Article 9 of the 1952 Convention. If so understood this, in their Lordships' view, lends support to the proper characterisation of its legal nature under Singapore law as procedural or remedial, and thus governed solely by the *lex fori*.

Their Lordships are accordingly of opinion that in principle, in accordance with long-established English authorities and consistently with international comity as evidenced by the wide acceptance of the Inter-

national Convention of 1952 on the Arrest of Sea-going Ships, the question whether or not in the instant case the Necessaries Men are entitled to priority over the Mortgagees in the proceeds of sale of the "Halcyon Isle" depends upon whether or not if the repairs to the ship had been done in Singapore the repairer would have been entitled under the law of Singapore to a maritime lien on the "Halcyon Isle" for the price of them. The answer to that question is that they are not. The Mortgagees are entitled to priority.

In the instant case as in the two Canadian cases of *"The Strandhill"* and *"The Ioannis Daskalelis"*, the claim of the Necessaries Men is for the price of repairs to the ship. Such a claim, wherever the repairs were done, whether in Singapore or abroad, may well invite sympathy since the repairs may be added to the value of the ship and thus to the value of the security to which the Mortgagees can have resort. As a matter of policy such a claim might not unreasonably be given priority over claims by holders of prior mortgages the value of whose security had thereby been enhanced. If this is to be done, however, it will, in their Lordships' view have to be done by the legislature. It is far too late to add, by judicial decision, an additional class of claim to those which have hitherto been recognised as giving rise to maritime liens under the law of Singapore; nor is this what the judgment of the Court of Appeal in the instant case purports to do. The argument for the Necessaries Men that was accepted by the Court of Appeal was not confined to claims for necessaries. It was that wherever a maritime claim of any of the kinds listed in paragraphs (d) to (q) of section 3(1) of the High Court (Admiralty Jurisdiction) Act gives rise to a maritime lien under its own *lex causae*, as could be the case with claims of every kind referred to in the list, even including damages for breach of charter-party if the *lex causae* was United States law, the High Court of Singapore is required by Singapore law to give the claim priority over earlier and subsequent mortgagees and over all claims for the price of necessaries supplied to the ship in Singapore itself or in any other country under whose domestic law claims for necessaries do not attract a maritime lien.

For the reasons already given their Lordships consider that this argument is unsound, and the appeal must be allowed, the judgment of the Court of Appeal set aside and the judgment of Kulasekaram J. restored. The respondents must pay the costs of the appeal to the Court of Appeal and of this appeal.

Lord Salmon and Lord Scarman (dissenting): In this appeal many questions have to be considered, but only one issue arises for decision. The issue is: when a ship is sold by order of the court in a creditor's action *in rem* against the ship and the proceeds of sale are insufficient to pay all creditors in full does a ship-repairer, who has provided his services and materials abroad and has by the *"lex loci"* the benefit of a maritime lien, enjoy priority over a mortgagee? Or is his foreign lien to be disregarded in determining his priority? The issue has arisen in Singapore but, so far as this appeal is concerned, the law of Singapore is substantially the same as the law of England. The trial judge ruled in favour of the mortgagee. The Court of Appeal reversed him, ruling in favour of the ship-repairer. The mortgagee now appeals to this Board. No question arises as to the jurisdiction of the court: High Court (Admiralty Jurisdiction) Act, section 3(1)(l) and (m). The one question is the effect within the jurisdiction of a maritime lien conferred by the *lex loci contractus*.

In *"The Tolten"* at p. 144 Scott L.J. described the maritime lien as "one of the first principles of the law of the sea, and very far-reaching in its effects." But, if the appellants are right, a maritime lien is in the modern law no more than a procedural remedy. So far from being far-reaching, its validity and effect will be subject to the domestic law of the forum in which it is sought to be enforced.

If this be the law, we have travelled a great distance from the concept of a universal law of the sea. We have returned to the legal climate which in England prior to 1840 nourished the common law courts by excluding the Admiralty jurisdiction from "the body of the County", i.e. the internal waters, ports and dockyards of the country. In the climate of a dominating domestic law the concepts and principles of the law of the sea wilt and die.

The Court of Appeal in Singapore, allying itself with the Supreme Court of Canada and accepting the classic description of a maritime lien to be found in the English cases (notably *"The Bold Buccleugh"*) refused to treat a maritime lien as a mere procedural remedy. Delivering the judgment of the court, the Chief Justice said: —

> "Apart from authority, we are of the opinion that in principle the courts of this country ought to recognise the substantive right acquired under foreign law as a valid right and to give effect to that recognition when determining the question of priorities between the ship repairers and the mortgagees of the res."

We agree that the issue in this appeal should be approached on the basis of principle, and we attach great weight to the view of the Republic's Court of Appeal as to what the law of Singapore ought in principle to be.

The relevant facts are few and can be shortly stated. The "Halcyon Isle" is a British ship. The appellants, an English company, were first mortgagees and registered as such on May 8, 1974. The respondents are American ship-repairers who in March 1974 did repairs and supplied materials to the ship while it was in the port of New York. The ship reached Singapore waters in the summer of that year. While there, it was arrested. The ship-repairers had issued a writ *in rem* against the ship: so also had the mortgagees. After arrest, the ship was sold by order of the court. In due course the ship-repairers obtained a judgment for $237,011 and the mortgagees a judgment for $14,413,000. The proceeds of the sale amounted only to $1,380,000. If, therefore, the mortgagees win their appeal, they take all (subject to certain admitted preferential claims by other creditors). If the ship-repairers are victorious, they will be paid in full, the mortgagees taking what remains after the ship-repairers have been paid.

First, certain matters which are not in dispute. Under U.S. law a ship-repairer has a maritime lien

against the ship. According to the uncontradicted evidence of a New York "attorney at law and Proctor in Admiralty" the rendition by the ship-repairer of services and repairs to the ship "gives rise to a valid maritime lien ... which confers upon [him] rights of the same nature and quality as are conferred upon the holder of a maritime lien under English law." It is equally not in dispute that under the law of Singapore, as of England: —

(1) "whatever relates to the remedy to be enforced, must be determined by the *lex fori*": Lord Brougham, *Don* v. *Lippmann;*[19]

(2) the priority of creditors claiming against a fund in court (including the proceeds of the judicial sale of a ship) is governed by the *lex fori;*

(3) the claim of a mortgagee has priority over the claim of a ship-repairer for repairs executed in Singapore;

(4) ship-repairers do not have a maritime lien on a ship for repairs executed in Singapore;

(5) a claimant who has a maritime lien recognised by the law has priority over a mortgagee.

These propositions are to be found stated in the Court of Appeal's judgment as being not in dispute. They narrow the issue to the question: does the law of Singapore recognise a foreign maritime lien as a substantive right of property vested in a claimant who can show that he enjoys it under the law of the place where he performed his services? The law, admittedly, gives effect to a validly established foreign mortgage, recognising that the mortgage is an essential element of the claim. Is a validly established foreign maritime lien to be treated in the same way, as part of the claim? Or is it a remedy made available by the *lex fori*?

The law of Singapore follows English law in restricting maritime liens arising under its domestic law to only a few cases; in modern conditions, they are for all practical purposes limited to salvage, wages (or salaries) of the crew, master's disbursements and liabilities incurred on behalf of the ship, and damage done by the ship: *"The Ripon City"*. Whether it be put in terms of the law of the sea or of the rules of private international law, the question has to be asked and answered in this appeal: does English and Singapore law recognise a foreign maritime lien, where none would exist, had the claim arisen in England or Singapore? Whatever the answer, the result is unsatisfactory. If in the affirmative, maritime states may be tempted to pass "chauvinistic" laws conferring liens on a plurality of claims so that the claimants may obtain abroad a preference denied to domestic claimants; if in the negative, claimants who have given the ship credit in reliance upon their lien may find themselves sorely deceived. If the law of the sea were a truly universal code, those dangers would disappear. Unfortunately the maritime nations, though they have tried, have failed to secure uniformity in their rules regarding maritime liens: see the fate of the two Conventions of 1926 and 1967 [*British Shipping Laws* (2nd Edn.), Vol. 8 (Singh) pages 1392, 1397] each entitled (optimistically) an International Convention for the Unification of Certain Rules of Law relating to Maritime Liens and Mortgages. Though it signed each of them, the United Kingdom has not ratified either of them; Singapore (fully independent since 1965) has signed neither of them. In such confusion policy is an uncertain guide to the law. Principle offers a better prospect for the future.

Against this background the submissions of the parties have to be considered. The basic submission of the appellants is that in determining priorities the *lex fori* looks to the nature of the claim, and has no regard to the existence, or absence, of a maritime lien. The nature of the claim determines the priority of the judgment debt founded upon it. The claim of the ship-repairer is that of a Necessaries Man and, by the *lex fori*, ranks after the claim of a mortgagee. The reference in the books to the ranking of maritime liens before mortgage debts means no more than that the claims which under the domestic law have the benefit of a maritime lien — notably salvage, wages and for damage done by the ship — enjoy their priority not because they have the "privilege" of a maritime lien but because of the nature of the claims themselves.

The respondents submit that a maritime lien is a substantive property right given by the law as a security for the claim and attaching to the claim as soon as the cause of action arises, though it does not take effect until legal proceedings are brought against the ship. They submit that it is as absurd, in characterising a claim to which the law attaches the security of a maritime lien, to ignore the existence of the lien as it would be to characterise a mortgagee's claim as merely one for the repayment of money lent. In each the security is part of the nature of the claim. They further submit that both principle and the weight of authority (which it is conceded is not all one way) support the view, for which they contend: — that English law has regard to the maritime lien in determining the nature of the claim. If, therefore, the court finds that the claim has under its *lex loci* a valid maritime lien, the *lex fori* will give the claim the priority over a mortgagee which it accords to a claim having the benefit of an English lien.

In *"The Bold Buccleugh"* Sir John Jervis looked at the maritime law to help him towards a decision that English law recognised damage done by a ship in a collision as creating a maritime lien: and this at a time when Parliament had already intervened to put Admiralty jurisdiction on a statutory basis; Admiralty Court Act, 1840 (3 & 4 Vict. c.65). After contrasting a maritime lien with the possessory lien of the common law, he said that in maritime law the word [i.e., lien] is used "to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession." He continued (p. 284): —

"This was well understood in the Civil Law, by which there might be a pledge with possession, and a hypothecation without possession, and by which in either case the right travelled with the thing into whosesoever possession it came. Having its origin in this rule of the Civil Law,, a maritime lien is well defined by Lord Tenterden, to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr. Justice Story (1 Sumner, 78) explains that process to be a proceeding *in rem*, and adds, that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding *in rem*, and indeed is the only court competent to enforce it."

In this passage he clearly identifies the origin of the concept in the maritime law (itself derived from the Roman and the Civil Law), compares it with a Civil Law *"hypotheque"*, and treats it as going to the nature of the claim. A little later, he describes it as a claim or privilege which "travels with the thing, into whosesoever possession it may come" and adds "when carried into effect by ... a proceeding *in rem*, relates back to the period when it first attached": pp. 284, 285.

The subsequent case law has, save in one respect, adopted and developed Sir John Jervis's description of the nature and incidents of the maritime lien. Sir John Jervis (p. 284) declared:

"that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists:"

but the Admiralty jurisdiction of the English court has developed otherwise: for an action *in rem* is available in respect of claims to which no maritime lien attaches. The history of this development is referred to by Scott L.J. in *"The Tolten"*, *supra*, at pp. 144, 145: but he cites with approval the conclusion of Gorell Barnes J. in *"The Ripon City"*, *supra*, at p. 242:

"It [*i.e.* a maritime lien] is a right acquired by one over a thing belonging to another — a *jus in re aliena*. It is, so to speak, a subtraction from the absolute property of the owner in the thing."

The classic cases, from which these quotations have been taken, do not touch the question that arises in this appeal. The repairs were carried out by the respondents in the U.S.A. under a contract with the then owners of the ship; this contract was governed by the *lex loci contractus*, as both parties to the contract must have known. This law indubitably conferred a maritime lien on the respondents in respect of their repairs to this ship: otherwise the respondents would never have allowed the ship to leave their yard without payment. It is obvious also that these repairs must have added to the value of the ship and therefore to the value of the security of the appellant mortgagees.

The law relating to the repair of ships in England under contracts governed by English law differs, however, from that in the U.S.A. The repairers of a ship in England do not acquire any maritime lien over a ship which they have repaired; and accordingly they rarely allow the ship to leave their yard until they are paid, or have arranged other security for the repairs.

In England, the *lex fori* decides the priority of the rights which exist against a ship, e.g. the rights conferred by a maritime lien taking precedence over the rights of a mortgagee. The question is — does English law, in circumstances such as these, recognise the maritime lien created by the law of the U.S.A., i.e. the *lex loci contractus* where no such lien exists by its own internal law? In our view the balance of authorities, the comity of nations, private international law and natural justice all answer this question in the affirmative. If this be correct then English law (the *lex fori*) gives the maritime lien created by the *lex loci contractus* precedence over the appellants' mortgage.

If it were otherwise, injustice would prevail. The respondents would be deprived of their maritime lien, valid as it appeared to be throughout the world, and without which they would obviously never have allowed the ship to sail away without paying a dollar for the important repairs upon which the respondents had spent a great deal of time and money and from which the appellants obtained substantial advantages.

It is suggested in the majority judgment that the respondents were well aware that the *lex loci contractus*, conferring upon them their maritime lien, was likely to be disregarded by overseas *lex fori* in its determination of priorities. We entirely disagree. The importance which the respondents attached to their maritime lien is clearly shown by the ship repair contract which included the term: —

"Nothing herein shall be deemed to constitute a waiver of our maritime lien."

Moreover, in many countries the *lex loci* gives priority to maritime liens over mortgages.

In our opinion, the respondents clearly relied upon the fact that overseas the *lex loci* and the maritime lien which it created would both be respected, and the lien would be given the priority which it rightly received from the Court of Appeal in Singapore according to the law of Singapore and of England.

Finally, on this aspect of the matter, it must be remembered that the nations have failed to introduce a uniform code governing maritime liens. The two international conventions relating to maritime liens, upon which the majority places great weight, cannot affect, in our view, the result of this appeal. Neither of them has been signed by Singapore; and neither of them ratified by the United Kingdom.

It is submitted, however, by the appellants that the weight of authority supports their case. We do not agree: we think that the contrary is true.

In *"The Milford"* the question was whether the statute gave a foreign master a remedy against the freight for his wages. Dr. Lushington doubted whether he was called upon to give any opinion on the foreign law (p. 365) and, in the result, gave none, holding that the 191st section of the Merchant Shipping Act, 1854 gave the master the same right and remedies as seamen have (p. 367). The statute gave a remedy; and he applied it. It was not, therefore, necessary to go into the *lex loci contractus*. The decision is no authority for the proposition that an English court will never have regard to the *lex loci contractus* in order to determine the nature of the claim for the purpose of determining its priority, or that, in determining its nature, it will disregard the existence of a validly created foreign maritime lien.

"The Tagus" also turned on the language of the same statutory provision, by now section 167 Merchant Shipping Act, 1894. The law of Argentina, the *lex loci contractus*, gave a privilege on the ship and freight only for wages due for the last voyage. The British statute was not so limited. It was "perfectly general" in its terms (p. 53). The question is simply one of remedy, and was recognised as such by Scrutton L.J. in *"The Colorado"* at p. 108. *"The Tagus"*

does not touch on the question any more than does *"The Milford"*. Both turn on the question of remedy. Nobody doubted in either case that the master had a claim. But in neither case did the court have to consider whether or not he had under the *lex loci* a maritime lien (in *"The Tagus"* he plainly had none other than for his last voyage): for he had a remedy under the statute.

Whatever be the true analysis of these two cases, the English law must be seen as having been settled in favour of paying regard, in appropriate cases, to the *lex loci contractus*, if *"The Colorado"*, *supra*, was correctly decided. It was a decision of the Court of Appeal (Bankes, Scrutton and Atkin L.JJ). The court had before it a motion to determine priorities. The competing claimants were Cardiff ship-repairers and the holder of a French *"hypothèque"*. It was established that the French courts would give a necessaries man priority over a *hypothécaire*. English courts would, of course, do the reverse; for English law postpones a necessaries man to persons who have what is equivalent to a maritime lien. The Court of Appeal applied the priorities of its *lex fori*, but looked to the French law to determine the nature of the claim based on a *hypothèque*. Scrutton L.J. at p. 109, described the approach of the courts to the problem in these words: —

"Now the English Court has a claim from an English necessaries man who has no possessory lien or maritime lien, but merely in England a right to arrest the ship *in rem* to satisfy his claim against the owner of the ship. It has also a claim by a person who has a *hypothèque*, and it may legitimately consult the foreign law as to what a *hypothèque* is. It is proved to be, not a right of property in the ship, but a right to arrest the ship in the hands of subsequent owners to satisfy a claim against a previous owner. But such a right is the same as a maritime lien as described by Mellish L.J. in *"The Two Ellens"*,[10] by Gorell Barnes J. in *"The Ripon City"*,[3] and by this court in *"The Tervaete"*.[17] And the English Courts administering their own law would give a claim secured by a maritime lien priority over the claim of a necessaries man, who cannot arrest the ship against a subsequent owner. The fallacy of the appellants' argument appears to be that because the French Courts would give a French necessaries man, or a necessaries man suing in the Courts of France, priority over the claimant under a *hypothèque*, therefore an English Court should give an English necessaries man similar priority. The answer is that the appellants are not asking for French remedies, but English remedies; and the English law postpones them to persons who have what is equivalent to a maritime lien."

Bankes L.J. (p. 107) and Atkin L.J. (pp. 111-112) also looked to the French law to establish the nature of the claim. Bankes L.J. described it as having

"attributes which entitled it to rank on a question of priorities in the same class as a maritime lien;"

and Atkin L.J. said it was

"a right closely resembling a maritime lien."

The case is a neat illustration of the application of two principles of the law. The court looks to the *lex loci* to determine the nature of the claim. Having established its nature, the court applies the priorities of its own law, the *lex fori*.

The effect of the decision is succinctly summarised in the 9th edition of *Cheshire's* "Private International Law" (p. 697):

"French law determined the substance of A's right, English law determined whether a right of that ranked before or after an opposing claim."

Two more recent cases, however, contain *obiter dicta* which in our opinion are inconsistent with the decision in *"The Colorado"*. In *"The Zigurds"* Langton J. had to consider a submission based on *"The Colorado"*. It was submitted that a German necessaries man had under German law rights equivalent to those of a maritime lien and should, accordingly, enjoy the priority given by English law to a maritime lienor's claim. The judge negatived the submission as to the effect of German law: but, discussing *"The Colorado"*, he indicated his opinion that English law would not allow its priorities to be determined by the existence of a foreign maritime lien where none would be given by English law. However, he concluded (p. 125) that it was "idle" to consider debatable questions as to maritime liens in other cases since he had accepted expert evidence that German law gave no analogous rights in the case he had to decide.

Hewson J. adopted a similar approach in *"The Acrux"*. Again the point did not arise for decision, the question in the case being whether social insurance contributions required by Italian law to be paid by shipowners in respect of the crews of Italian ships were to be treated as part of the crews' wages for the purpose of determining whether English courts had jurisdiction to entertain a claim for their recovery under section 1(1)(o) of the Administration of Justice Act, 1956. The question was as to the meaning of "wages" in the subsection. Nevertheless the judge went on to consider whether Italian law conferred a maritime lien on the claim. He found that it did, but expressed the opinion that it was not one which would be recognised by the English courts: p. 402G. He added, at p. 403E:

"the categories of maritime lien as recognised by this court cannot, in my view, be extended except by the legislature."

If this expression of opinion be correct, it constitutes a denial of the approach adopted by the Court of Appeal in *"The Colorado"*. It would deny the courts the opportunity, which was taken in *"The Colorado"*, to have resort to the rules of private international law. And if it be urged that a better result would be achieved by a new international convention to be accepted by the maritime nations of the world, we would reply that experience suggests that such a convention may be a long time coming. Meanwhile the aid of private international law, slender and inadequate though it is, should not, in our opinion, be rejected.

The difference of approach visible in the English case law is reflected elsewhere. Since *"The Colorado"* was decided, there have been two notable decisions overseas, which have taken the line, indicated by Langton J. in *"The Zigurds"* and by Hewson J. in *"The Acrux"*, that the existence of a foreign maritime lien is not to be considered in determining the nature of the claim, for which priority is sought. They are *Coal Export Corporation* v. *Notias*[20] (East African Court of Appeal in Aden) and *"The Christine Isle"*[21] (Bermuda). But a series of Canadian cases had adopted *"The Colorado"* approach: see particularly *Strandhill* v. *Hodder* (*"The Strandhill"*) and a decision of the Supreme Court, *"The Ioannis Daskalelis"*. We agree with the Court of Appeal in thinking that

the Supreme Court's reasoning is very persuasive: and would draw attention, as the learned Chief Justice did, to a comment of Ritchie J. at p. 178, where he treated *"The Colorado"* as authority for the contention

"that where a right in the nature of a maritime lien exists under a foreign law which is the proper law of the contract, the English Courts will recognise it and will accord it the priority which a right *of that nature* would be given under English procedure."

In our opinion the English Court of Appeal in *"The Colorado"* adopted the approach which is correct in principle. A maritime lien is a right of property given by way of security for a maritime claim. If the Admiralty court has, as in the present case, jurisdiction to entertain the claim, it will not disregard the lien. A maritime lien validly conferred by the *lex loci* is as much part of the claim as is a mortgage similarly valid by the *lex loci*. Each is a limited right of property securing the claim. The lien travels with the claim, as does the mortgage: and the claim travels with the ship. It would be a denial of history and principle, in the present chaos of the law of the sea governing the recognition and priority of maritime liens and mortgages, to refuse the aid of private international law.

For these reasons, we think that the Court of Appeal reached the correct conclusion and would dismiss the appeal.

Appeal allowed.

Solicitors: *Linklaters & Paines; Thomas Cooper & Stibbard.*

SINGAPORE REPORTS

HARRY LEE WEE v. HAW PAR BROTHERS INTERNATIONAL LTD.

[C.A. (Kulasekaram, Chua & Rajah JJ.) August 1, 1980]
[Singapore — Civil Appeal No. 47 of 1979]

Practice and Procedure — Costs — Lump sum bill not itemised — Order for taxation — Inherent jurisdiction of court — Appeal against order.

The present appeal arose out of the lower court's decision ordering the defendant's bill of costs to be taxed (see [1980] 2 M.L.J. 8). The facts were briefly as follows. The plaintiff company retained the defendant's firm as solicitors for the plaintiff company and its subsidiaries from November 1975 to August 1976. During that period the plaintiff paid $119,500 to account of costs, excluding disbursements. The defendant had submitted 27 bills which amounted to $610,000 exclusive of disbursements. Apart from the payment of the said $119,500, the plaintiff made no further payments on the said bills as it was of the view that the amounts charged were grossly excessive.

Held, dismissing the appeal: (1) if a solicitor is engaged by a client in his capacity as solicitor then all his bills, whether for legal or non-legal work, are subject to taxation under the Legal Profession Act (Cap. 217);

(2) the quantum and the size of the main bill (No. 67/77) with its detailed itemization and narration of the work done without any sum being shown against each such item but a final lump sum figure shown to represent the costs of all the items were in themselves special circumstances for the exercise of the court's discretion in this case;

(3) in the instant case there had been prolonged negotiations between the parties and it was only when such negotiations had broken down that proceedings were commenced by the defendant. This, in itself, was a special circumstance which would have justified the court in exercising its discretion to order taxation.

Cases referred to:-

(1) *Allen* v. *Jarvis* (1869) L.R. 4 Ch. A. 616.
(2) *Allen* v. *Aldridge* 49 E.R. 633.
(3) *In re Jones* (1871) L.R. 13 Eq. 336.
(4) *In re Baker, Lees & Co.* [1903] 1 K.B. 189.
(5) *In re Robinson* (1867) 3 Ex. 4.
(6) *In re A Solicitor* [1961] Ch. 491.
(7) *In re Norman* (1886) 16 Q.B.D. 673.
(8) *In re Cheeseman* [1891] 2 Ch. 289.

CIVIL APPEAL.

Y.R. Jumabhoy for the appellant.

L.P. Thean for the respondents.

Cur. Adv. Vult.

Rajah J. (delivering the judgment of the Court): The plaintiff company retained the defendant and his firm of solicitors of Messrs. Braddell Brothers, to act as solicitor for the plaintiff and its subsidiaries on various matters from early November 1975 to August 31, 1976, when the defendant's services were terminated.

The defendant was to be paid a retaining fee of $1,500 per month from January to September 1976; this payment was however in addition to the fees payable to the defendant for work done by him for the plaintiff and/or its subsidiaries.

In August and September 1976 the defendant delivered to the plaintiff two lump sum bills of costs, brief particulars of which are as follows: